Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS N-01–149–04 OF 2012, N-02(IM)-2369–10 OF 2013, N-02(IM)-2370–10/2 OF 2013, N-01–55–02 OF 2012, N-01–270–06 OF 2012 AND N-02(IM)-570–03 OF 2014

ZAWAWI SALLEH, NALLINI PATHMANATHAN AND VERNON ONG JJCA

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Tort — Negligence — Land — Developer developed land adjacent to complainant's land — Developer carried out process known as pipe jacking — Complainant's land split into two and earth drain in middle widened to resemble stream — Whether developer built and construct adequate drainage system — Whether local authority responsible for negligence — Whether local authority enjoys any form of protection under law — Street, Drainage and Building Act 1974 s 95(2)

Tort — Nuisance — Earthworks — Developer developed land adjacent to complainant's land — Developer carried out process known as pipe jacking — Complainant's land split into two and earth drain in middle widened to resemble stream — Whether developer built and construct adequate drainage system — Whether nuisance proven

Tort — Trespass to land — Damages — Developer developed land adjacent to complainant's land — Developer carried out process known as pipe jacking — Complainant's land split into two and earth drain in middle widened to resemble stream — Whether developer built and construct adequate drainage system — Whether trespass proven — Whether case in either trespass or under rule in Rylands v Fletcher proven

The respondent ('the plaintiff') was the registered owner of a land. Prior to an acquisition, the appellant ('Arnica') developed a piece of land adjacent to the plaintiff's land, forming a part of a scheme called Taman Perindustrian Nilai ('the scheme'). The plaintiff's land was adjacent to the said scheme but on lower land. Arnica's land is higher and naturally sloped down towards the plaintiff's land which was on a lower level. Between the said scheme and the plaintiff's land, there was a railway track built on a raised platform and railway reserve land. A small stream on the plaintiff's land was used as a discharge outlet for water accumulated at the base of the elevated railway tracks via existing small

culverts underneath the railway tracks. When Arnica started to develop the said scheme, it found that the culverts were not efficient enough to accommodate the increase in volume of water discharged from the said scheme, particularly during the wet season. The relevant authority directed Arnica to construct a proper and adequate drainage system. Arnica carried out a process known as 'pipe jacking' and installed two new culverts underneath the railway tracks. The portion of the plaintiff's land comprising the extent of the earth drain, was compulsorily acquired by the state government and the plaintiff was paid compensation. Now, the plaintiff's land had split into two and separated by the widened earth drain which resembled a stream. The plaintiff complained that his land was adversely affected by flooding and was damaged due by the large amount of water discharged from the said scheme. The plaintiff then filed a claim against Arnica based on trespass to land, negligence, nuisance and strict liability. The plaintiff also filed a claim against Majlis Perbandaran Nilai ('Majlis') for negligence in failing to ensure Arnica built and construct an adequate drainage system after the acquisition of the plaintiff's land. Arnica denied responsibility for the damage suffered maintaining that it had at all material times complied with and adhered to the instructions and directions of the Jabatan Parit dan Saluran ('JPS') which had approved its plans including the drainage works carried out, namely the pipe jacking. Arnica therefore denied all liability for the plaintiff's loss. At the High Court, on the issue of liability, the judge held that the plaintiff had proved its case in negligence and nuisance, on a balance of probabilities, against Arnica but did not establish a case in either trespass or under the rule in *Rylands v Fletcher*. The suit against Majlis was dismissed on the grounds that Majlis enjoyed immunity against suit under sub-s 95(2) of the Street, Drainage and Building Act 1974. Arnica was found liable to the plaintiff in the sum of RM2,017,160 as damages. Hence, the present appeals.

Held, dismissing the appeals with costs:

(1) Arnica knew or ought to have known that the development it was constructing would result in the discharge of a large volume of water. Upon commencement of the development, large amounts of water started to accumulate at the base of the railway tracks. The water would then eventually flow onto the plaintiff's land through an earth drain prior to joining a large river. The accumulation of water at the base of the railway tracks necessitated Arnica undertaking an upgrading of the drainage system in relation to the discharge of water (see para 35).

(2) After acquisition of the earth drain or stream in 1994, Arnica retained full access to the same and knew or ought to have been aware of the effects of the discharge of large quantities of water through the inadequate earth drain, resulting in erosion of the banks and effective encroachment onto the plaintiff's land. Arnica's contention that it was the duty of Majlis to upkeep the earth drain which had been acquired by the Government did

not answer the plaintiff's complaint that it was the discharge of water from the development site that caused water to overflow from the inadequate earth drain onto the plaintiff's land. Therefore, it was the water flowing from the development site, rather than the maintenance of the earth drain that caused the damage to the plaintiff's land (see paras 50–51).

(3) Arnica failed or neglected to adduce any expert evidence to rebut the evidence of the plaintiff's witnesses that the damage was caused by Arnica's activities. There was simply insufficient evidence adduced on the part of Arnica to contradict or deny the plaintiff's analysis of the circumstances causing the damage. Arnica's contended that there was a time span of five years between the completion of the earth drain works and the occurrence of the flooding meant that it could not have been solely responsible for the damage to the plaintiff's land. The time span in itself did not mean that the water discharged from Arnica's development site did not cause damage to the plaintiff's land. Arnica failed to call any expert witness to establish that the existence of the time span gave rise to the possibility of other or alternative causes for the damage to the plaintiff's land (see paras 52–54).

(4) On the issue of the refusal of the judge to allow Arnica to adduce in evidence additional documents in the course of the trial, namely some sketch plans, this refusal had no real adverse effect on Arnica's case as the judge accepted the JPS approved plans. As these documents were sketch plans annexed to the letter already in evidence, the non-adducing of these documents did not affect Arnica adversely. The judge could not be faulted for having so exercised her discretion, given that Arnica only sought to adduce this evidence after the plaintiff's expert had completed his evidence. In other words, the plaintiff would have been deprived of an opportunity to deal with questions arising in relation to these plans, or it would have been necessary to re-call the plaintiff's expert (see paras 56–57).

[Bahasa Malaysia summary

Responden ('plaintif') ialah pemilik berdaftar tanah. Sebelum pemerolehan itu, perayu ('Arnica') telah memajukan sebidang tanah bersebelahan tanah plaintif, yang membentuk sebahagian daripada satu skim dikenali sebagai Taman Perindustrian Nilai ('skim tersebut'). Tanah plaintif terletak bersebelahan skim tersebut tetapi di tanah yang lebih rendah. Tanah Arnica adalah lebih tinggi dan secara semula jadi cerun ke bawah ke arah tanah plaintif iaitu pada paras yang lebih rendah. Di antara skim tersebut dan tanah plaintif, terdapat landasan kereta api yang dibina atas pelantar yang dinaikkan dan tanah rizab kereta api. Sebuah sungai kecil di atas tanah plaintif telah digunakan sebagai saluran keluar pelepasan air terkumpul pada pangkal landasan kereta api yang tinggi melalui pembetung kecil sedia ada di bawah

landasan kereta api. Apabila Arnica mula membangunkan skim tersebut, ia mendapati bahawa pembetung itu tidak cukup berkesan untuk menampung peningkatan jumlah air yang dilepaskan daripada skim tersebut, terutamanya semasa musim hujan. Pihak berkuasa yang berkenaan mengarahkan Arnica untuk membina sistem perparitan yang sesuai dan berpatutan. Arnica telah melaksanakan proses yang dikenali sebagai 'pipe jacking' dan memasang dua pembetung baru di bawah landasan kereta api itu. Bahagian tanah plaintif terangkum sejauh mana longkang tanah itu, telah diperoleh oleh kerajaan negeri dan plaintif telah dibayar pampasan. Sekarang, tanah plaintif terbelah dua dan dipisahkan oleh longkang tanah yang dibesarkan menyerupai sungai. Plaintif mengadu bahawa tanahnya terjejas teruk akibat kebanjiran dan rosak disebabkan jumlah air banyak yang dilepaskan dari skim tersebut. Plaintif kemudian telah memfailkan tuntutan terhadap Arnica berdasarkan pencerobohan tanah, kecuaian, kacau ganggu dan liabiliti tegas. Plaintif juga telah memfailkan tuntutan terhadap Majlis Perbandaran Nilai ('Majlis') untuk kecuaian kerana gagal memastikan Arnica membangun dan membina sistem perparitan yang bersesuaian selepas pemerolehan tanah plaintif. Arnica menafikan tanggungjawab untuk ganti rugi yang dialami dan menegaskan bahawa ia telah pada setiap masa matan menurut dan mematuhi arahan dan hala tuju Jabatan Parit dan Saluran ('JPS') yang telah meluluskan pelannya termasuklah kerja perparitan yang dijalankan, iaitu 'pipe jacking'. Arnica dengan itu menafikan semua liabiliti untuk kerugian plaintif. Di Mahkamah Tinggi, berhubung isu liabiliti, hakim memutuskan bahawa plaintif telah membuktikan kesnya untuk kecuaian dan kacau ganggu, atas imbangan kebarangkalian, terhadap Arnica tetapi tidak membuktikan kes untuk pencerobohan atau di bawah prinsip dalam *Rylands v Fletcher*. Guaman terhadap Majlis telah ditolak atas alasan bahawa Majis menikmati kekebalan terhadap guaman di bawah sub-s 95(2) Akta Jalan, Parit dan Bangunan 1974. Arnica didapati bertanggungjawab kepada plaintif untuk jumlah RM2,017,160 sebagai ganti rugi. Justeru, rayuan-rayuan ini.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Arnica mengetahui atau patut mengetahui bahawa pembangunan yang dibinanya akan mengakibatkan pelepasan air dalam jumlah yang banyak. Selepas pembangunan itu dimulakan, jumlah air yang banyak mula berkumpul di dasar landasan kereta api itu. Air itu kemudian akan akhirnya mengalir ke dalam tanah plaintif melalui longkang sebelum bersambung ke sungai besar. Pengumpulan air di dasar landasan kereta api itu memerlukan Arnica melakukan kerja menaik taraf sistem perparitan berkaitan pelepasan air (lihat perenggan 35).

(2) Selepas pemerolehan longkang atau sungai itu pada 1994, Arnica mengekalkan akses penuh dan mengetahui atau patut menyedari tentang kesan pelepasan air dalam kuantiti yang besar melalui longkang yang tidak mencukupi, yang mengakibatkan hakisan kepada tebing tanah dan

pencerobohan yang berkesan ke atas tanah plaintif. Hujah Arnica bahawa ia adalah tugas Majlis untuk menyelenggara longkang itu yang telah diperoleh oleh Kerajaan tidak menjawab aduan plaintif bahawa ia adalah pelepasan air dari tapak pembangunan itu yang telah menyebabkan air melimpah dari longkang yang tidak mencukupi itu ke dalam tanah plaintif. Oleh itu, ia adalah air yang mengalir dari tapak pembangunan itu, dan bukan penyelenggaraan longkang tanah itu yang telah menyebabkan kerosakan kepada tanah plaintif (lihat perenggan 50–51).

(3) Arnica telah gagal atau tidak endah untuk mengemukakan apa-apa keterangan pakar bagi mematahkan keterangan saksi-saksi plaintif bahawa kerosakan itu disebabkan oleh kegiatan Arnica. Sememangnya keterangan yang tidak mencukupi telah dikemukakan di pihak Arnica untuk menentang atau menafikan analisis plaintif tentang keadaan yang menyebabkan kerosakan itu. Arnica berhujah bahawa terdapat jangka masa lima tahun antara penyiapan kerja longkang itu dan berlakunya banjir itu yang bermaksud bahawa ia tidak mungkin bertanggungjawab sepenuhnya untuk kerosakan kepada tanah plaintif. Jangka masa itu sendiri tidak bermaksud bahawa air yang dilepaskan dari tapak pembangunan Arnica tidak menyebabkan kerosakan kepada tanah plaintif. Arnica telah gagal memanggil mana-mana saksi pakar untuk membuktikan bahawa kewujudan jangka masa itu menimbulkan kebarangkalian sebab lain atau alternatif untuk kerosakan kepada tanah plaintif (lihat perenggan 52–54).

(4) Berhubung isu tentang keengganan hakim membenarkan Arnica mengemukakan keterangan dokumen tambahan sepanjang perbicaraan, iaitu pelan-pelan lakaran, keengganan ini tidak mempunyai kesan buruk kepada kes Arnica kerana hakim itu telah menerima pelan-pelan yang diluluskan oleh JPS. Oleh kerana dokumen-dokumen tersebut merupakan pelan-pelan lakaran yang dilampirkan kepada surat yang telah pun menjadi keterangan, dokumen-dokumen tersebut yang tidak dikemukakan itu tidak menjejaskan Arnica dengan teruk. Hakim tidak boleh disalahkan kerana melaksanakan budi bicara beliau, dengan mengambil kira bahawa Arnica hanya memohon untuk mengemukakan keterangan ini selepas pakar plaintif telah selesai dengan keterangannya. Dalam kata lain, plaintif akan dinafikan peluang untuk menangani soalan yang timbul berkaitan pelan-pelan tersebut atau ia perlu untuk memanggil semula pakar plaintif (lihat perenggan 56–57).]

Notes

For cases on damages, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2322–2331.

For cases on negligence in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 1046–2139.

For cases on nuisance in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2140–2209.

Cases referred to

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Donoghue (or McAlister) v Stevenson [1932] AC 562, HL (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Rylands and another v Fletcher [1861-73] All ER Rep 1, HL (refd)
Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd [1986] 1 MLJ 412; [1985] 1 LNS 103 (refd)

Legislation referred to

Street, Drainage and Building Act 1974 s 95(2)

Appeal from: Civil Suit Nos 22–16 of 2001 and 22–93 of 2001 (High Court, Seremban).

Bill Davidson (Tee Geok Hock, N Rajentharan, Siew Kai Lee and Goh Chin How with him) (GH Tee & Co) for the appellant.
Lam Ko Luen (Aaron Mathews with him) (Shook Lin & Bok) for the first respondent.
Ramzani bin Idris (Haresh Mahadevan) for the second respondent.

Nallini Pathmanathan JCA:

[1] The appellant, Arnica Corporation Sdn Bhd ('Arnica'), filed six separate appeals against decisions of the High Court in relation to two suits filed by the first respondent, one Robert Teo Keng Tuan ('the plaintiff'), against Arnica and a second suit against Majlis Perbandaran Nilai Negeri Sembilan ('the Majlis'). The two suits were consolidated and heard together. However, the trial of the action was bifurcated in that the issue of liability was heard first, followed by a separate hearing before a different judge for the assessment of damages.

APPEAL NO N-01–270–06 OF 2012 — APPEAL AGAINST FINDING OF LIABILITY AGAINST ARNICA

[2] With regards to the issue of liability, the learned judge determined after a full trial of the consolidated suits that the plaintiff had proved its case in negligence and nuisance, on a balance of probabilities, against Arnica. The learned judge also concluded that the plaintiff did not establish a case in either trespass or under the rule in *Rylands v Fletcher*.

[3] The suit against the Majlis was dismissed on the grounds that the Majlis

enjoyed immunity against suit under sub-s 95(2) of the Street, Drainage and Building Act 1974.

[4] Arnica appealed against this finding on liability and that appeal comprises the primary appeal here.

APPEAL NO N-01–55–02 OF 2014 — APPEAL AGAINST ASSESSMENT OF DAMAGES BY ARNICA

[5] The learned judge who heard the assessment of damages determined that Arnica was liable to the plaintiff in the sum of RM2,017,160 as damages. This sum represents the costs for the construction of a proposed pre-cast box culvert reinforced concrete drain, damages for the loss suffered by the plaintiff in respect of palm oil trees, the costs of preparation of consultancy reports, transportation costs, general damages as well as exemplary damages.

[6] Arnica appealed against this decision on the quantum of damages awarded and this too comprises a primary appeal before us.

[7] In other words, of the six appeals, appeal number N-01–270–06 of 2012 deals with the issue of liability while N-01–55–02 of 2014 deals with the issue of damages. These are the primary appeals.

THE FOUR OTHER APPEALS LODGED BY ARNICA

[8] There are four other appeals, which arose in the course of the trial in relation to liability, as well as during the assessment of damages stage. The other four appeals are:

(a) N-01–149–04 of 2012 — Arnica's appeal against the decision of the High Court refusing to admit additional documents at the trial of the consolidated suit. The specific documents sought to be adduced were plans which ought to have been annexed to a letter of approval from the Jabatan Parit dan Saluran dated 1 November 1990, but which was inadvertently forgotten;

(b) N-02(IM)-2369–10 of 2013 — Arnica's appeal at the assessment of damages stage against the decision of the High Court allowing the application of the plaintiff in seeking the determination of a preliminary issue relating to the extent or scope of those proceedings;

(c) N-02(IM)-2370–10 of 2013 — Arnica's appeal at the assessment of damage stage against the decision of the High Court dismissing Arnica's application for leave to submit a specialist report dated 19 July 2013 in the hearing and to call the maker to tender evidence in support of Arnica's case; and

(d) N-02(IM)-570–03 of 2014 — Arnica's appeal against the decision of the High Court in dismissing its application to set aside the plaintiff's prayers in its statement of claim or alternatively to set aside the orders made by the court on 4 May 2012 relating to liability.

[9] The last four appeals relate to orders made by the High Court in the course of hearing and adjudicating on the primary issues of liability and assessment. To that extent they relate to specific orders made by the court in determining whether or not to allow certain evidence onto the record. To that extent these four appeals are more adjectival in nature than the primary two appeal relating to liability and quantum.

BRIEF BACKGROUND FACTS

[10] The plaintiff is the registered owner of Lot 1253 EMR 2675, Mukim Setul Negeri Sembilan. Due to the compulsory acquisition of a strip of land where an earth drain was located, the plaintiff's land is now split into two, namely Lot 13758 GM 4481 and Lot 13759 GM 4482. The acquisition took place on 27 April 1994.

[11] Prior to the acquisition, in or around November 1991, Arnica developed a piece of land adjacent to the plaintiff's land. Arnica's land now known as Taman Teknologi Nilai was part of a scheme called Taman Perindustrian Nilai ('the scheme'). It comprised 400 acres of land developed for industrial, commercial and residential development. The works for the said scheme commenced in or around November 1992.

[12] The plaintiff's land was adjacent to the said scheme but on lower land. Arnica's land is higher and naturally slopes down towards the plaintiff's land which is on a lower level.

[13] Between the said scheme and the plaintiff's land, there is a railway track built on a raised platform and railway reserve land.

[14] A small stream on the plaintiff's land was used as a discharge outlet for water accumulated at the base of the elevated railway tracks via existing small culverts underneath the railway tracks.

[15] When Arnica started to develop the said scheme, it found that the culverts were not efficient enough to accommodate the increase in volume of water discharged from the said scheme, particularly during the wet season.

[16] The relevant authority directed Arnica to construct a proper and adequate drainage system.

[17] Arnica carried out a process known as 'pipe jacking' and installed two new culverts underneath the railway tracks. Pipe jacking essentially means tunneling and such tunneling was carried out under the railway tracks to widen the existing culverts. It also as carried out upgrading works on the existing earth drain that ran across the plaintiff's land, thereby widening and deepening that earth drain. The earth drain was effectively transformed into a small stream.

[18] The plaintiff complained that Arnica or its contractor trespassed on its land when carrying out the upgrading works to the earth drain.

[19] On 27 April 1994, the portion of the plaintiff's land comprising the extent of the earth drain, was compulsorily acquired by the state government and the plaintiff was paid compensation. Now, the plaintiff's land is split into two and separated by the widened earth drain which resembles a stream.

[20] As a result, the plaintiff complains that his land was adversely affected by flooding and was damaged due by the large amount of water discharged from the said scheme. More particularly the plaintiff complains of the flooding of his lands in or around 28 March 1999 and 31 March 2009. The plaintiff then filed a claim against Arnica based on trespass to land, negligence, nuisance and strict liability under the *Rylands v Fletcher* rule (Civil Suit No 22–16 of 2001).

[21] The plaintiff also filed a claim against Majlis Perbandaran Nilai for negligence in failing to ensure Arnica built and construct an adequate drainage system after the acquisition of the plaintiff's land (Civil Suit No 22–93 of 2004).

[22] Arnica denied responsibility for the damage suffered maintaining that it had at all material times complied with and adhered to the instructions and directions of the Jabatan Parit dan Saluran ('the JPS') which had approved its plans including the drainage works carried out, namely the pipe jacking. Arnica therefore denied all liability for the plaintiff's loss.

HEARING BEFORE THE COURT OF APPEAL

Appeal on liability – Appeal No N-01–270–06 of 2012 & Appeal No N-01–149–04 of 2012

[23] At the hearing before us, learned counsel for Arnica, Dato' Bill Davidson, addressed us on the appeal relating to liability, as well as the appeal relating to the refusal of the High Court to admit as additional evidence the plans annexed to the letter of 1 November 1990, during the trial.

[24] The thrust of the submission in respect of the finding of liability against Arnica was that the plaintiff had failed to establish the case it had pleaded in negligence and as extensively pleaded in the statement of claim. Attention was drawn to the numerous particulars of negligence pleaded, and it was submitted that the plaintiff through its expert had simply failed to establish most of these allegations. Given Arnica's stance that it had adhered strictly to the plans and directions issued by JPS, learned counsel complained that the plaintiff's expert had not addressed the issue of what was wrong with the plans approved by JPS, and executed by Arnica.

[25] It was further submitted in relation to liability that the judgment of the High Court appears to suggest that the learned judge treated the case as if the doctrine of res ipsa loquitur was available on the factual matrix. Reference was made to a portion of the judgment where the learned judge held that the problem of flooding started after Arnica undertook the development on the scheme. The judge then stated: '… It is therefore obvious that Arnica has failed to provide adequate drainage system for the discharge of water from the said scheme'.

[26] Learned counsel for Arnica's complaint is that this finding appears to ignore the fact that even prior to 1994, the plaintiff's land had flooded. It was also erroneous to contend that as damage to the plaintiff's land occurred after the commencement of the development work, the damage must have been caused by such development work.

[27] In this context, it was pointed out that the factual matrix and evidence adduced in this case did not fall within the recognised fact pattern underlying a res ipsa loquitur situation. The doctrine was usually only invoked where '… (i) there was an unexplained occurrence, (ii) which would not have happened in the ordinary course of things without negligence on the part of someone other than the plaintiff, and (iii) the circumstances point to the negligence being that of the defendant rather than any other person. The last requirement is usually established by showing that the instrument causing the damage was in the management and control of the defendant at the time of the occurrence but this was not essential'. (see paras 6-100 – 6-131 of *Charlesworth & Percy on Negligence*).

[28] Arnica maintained that in the instant case the 'instrument', as it were, causing the damage was not under its control but under the control of the Majlis, which had compulsorily acquired the area of land comprising the earth drain/natural stream with effect from 1994. Attention was drawn to the fact that the flooding only occurred five years after the completion of works.

[29] It was further submitted that given the span of time between the completion of the works on the plaintiff's land and the occurrence of damage, coupled with the lack of maintenance work by the Majlis, there was a real possibility that there were alternative or other causes of action which contributed to the damage suffered by the plaintiff.

[30] Arnica's complaints in relation to the findings of liability by the learned judge may be summarised as follows:

(a) the plaintiff had failed to establish the numerous particulars of negligence pleaded in its statement of claim. In this context, there was no, or no sufficient evidence from a qualified expert to establish the core elements of negligence in the context of the factual matrix relating to the plaintiff's claim. The expert had failed to explain how or why the work carried out by Arnica pursuant to JPS approved plans was negligent or undertaken negligently;

(b) the learned judge had erred in invoking the evidential doctrine of res ipsa loquitur as the fact pattern of this case did not justify the use of this evidential rule; and

(c) the span of time between the completion of works by Arnica on the plaintiff's land and the actual occurrence of flooding suggested that there were other alternative causes for the discharge of large volumes of water onto the plaintiff's land. The failure of the Majlis to carry out maintenance works on the river was a possible cause.

[31] We have perused the appeal records in full and considered the submissions of learned counsel for the Arnica in this respect. Having done so it is our considered view that the evidence bears out, with respect, the learned judge's finding of negligence on the facts of this case.

Duty of care

[32] In relation to the existence of a duty of care, the learned judge correctly applied the 'neighbor' principle as enunciated by Lord Atkin in *Donoghue (or McAlister) v Stevenson* [1932] AC 562, namely that the lay of the land between the plaintiff and the defendant as occupiers of adjoining lands was such that Arnica might reasonably be expected to contemplate that its acts or omissions were likely to affect the plaintiff, in view of the proximity between the parties.

[33] In *Caparo Industries plc v Dickman* [1990] 2 AC 605, Lord Bridge summarised the ingredients to determine the existence of a duty of care as follows:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[34] In Malaysia, in the Federal Court case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, Steve Shim CJ (Sabah & Sarawak) distilled the *Caparo* test into the elements of 'foreseeability, proximity and the additional requirement of justice, fairness and reasonableness' (in para 14).

[35] Reverting to this case, upon commencement of the development, large amounts of water started to accumulate at the base of the railway tracks. The water would then eventually flowed onto the plaintiff's land through an earth drain prior to joining a large river. The accumulation of water at the base of the railway tracks necessitated Arnica undertaking an upgrading of the drainage system in relation to the discharge of water. This is not in dispute. As such, the learned judge's conclusion that Arnica knew or ought to have known that the development it was constructing would result in the discharge of a large volume of water, cannot be faulted.

Breach of the duty of care

[36] We also find that the learned judge addressed her mind specifically to the issue of a breach of the duty of care owed by Arnica to the plaintiff. In this context, the learned judge, with respect, asked the appropriate question, namely whether Arnica had breached its duty of care owed to the plaintiff by omitting to do anything it ought reasonably to have done in the circumstances.

[37] Having given due consideration to Arnica's defence that it had complied with the requisite plans and specifications approved by the relevant authorities, particularly JPS, the learned judge concluded that this did not absolve Arnica, as the large volume of water discharged from Arnica's land onto the plaintiff's land only occurred after the commencement of the development work. And this discharge of large volumes of water continued even after Arnica had undertaken drainage works, notwithstanding seeming compliance with approvals from the regulatory authorities.

Causation

[38] In the *Steven Phoa* case, Steve Shim CJ (Sabah & Sarawak) in determining the question whether Majlis Perbandaran Ampang Jaya's acts and

omissions were the causa causans of the Highland Towers tragedy, stated as follows:

> Causation is a matter to be determined by common sense and what the law regards as fair, just and reasonable in the circumstances of a particular case ... The relevant question is whether the acts and /or omissions of a particular defendant made a material contribution to the harm suffered by the plaintiff ...

[39] On the issue of causation, the learned judge concluded, on the basis of the evidence of SP1, Dr Kribanandan, that Arnica's installation of new culverts had caused an increase of flow of water under the railway tracks and onto the plaintiff's land compared to the situation prior to such construction. SP-1 was the consultant engineer appointed to ascertain the cause of the flooding and to find a remedy.

[40] Arnica being aware of this problem then sought the requisite permission to convert the water flowing through the plaintiff's land into an earth drain. However, this earth drain was simply insufficient to withstand the large volumes of water discharged from the scheme, causing it to erode the banks of the earth drain and to flood the plaintiff's land.

[41] The learned judge, therefore, relied on the evidence of the expert consultant engineer, SP1 and the consultant land surveyor, SP3 in determining that the damage sustained on the plaintiff's land was caused by Arnica's discharge of excessive quantities of water coupled with its negligent construction of an earth drain, entirely inadequate to meet the volume of water discharged.

[42] Finally, the learned judge concluded that Arnica's acts and negligent construction of the earth drain was compounded by the fact that pursuant to the acquisition of this strip of land, Arnica had total access to the earth drain. Notwithstanding this, and the clear evidence of erosion of the earth banks resulting in the widening of this drain due to the discharge of these large amounts of water, Arnica took no steps to remedy the situation.

Damage sustained by the plaintiff

[43] On the issue of damage sustained by the plaintiff as a consequence of the breach of the duty of care, reliance was placed on the evidence of the plaintiff, SP2, who testified that damage had been caused to his land by the occasional flooding arising from such discharge of water. His evidence was not successfully challenged.

[44] It is evident from the foregoing analysis that:

(a) there was sufficient evidence for the learned judge to arrive at a finding of negligence and nuisance. In this context, the fact that the plaintiff did not establish each and every particular of its pleaded claim did not mean that the plaintiff's claim had, necessarily, to fail. It simply meant that the plaintiff did not establish the entirety of its pleaded claim. But the plaintiff did adduce sufficient evidence to enable the learned judge to arrive at a finding of negligence and nuisance. This is clear from a perusal of the evidence of the plaintiff, SP2, the expert consultant engineer, SP1 and the consultant land surveyor, SP3;

(b) the consultant engineer, SP-1 was appointed primarily to find a remedy to the problem of the occasional flooding on the plaintiff's land. As stated in his report, his study was commissioned to provide an overview of the causes of the problem and to consider the options for the construction of a drainage system to minimize flooding and any encroachment due to erosion. SP-1, therefore, had to ascertain the cause of the flooding. It is in this context that he tendered his report and his evidence;

(c) Arnica sought to impugn his testimony as an expert on the basis that SP1 did not undertake a sufficiently technical approach to the problem, by for example measuring accurately the quantity of water discharged from its land and onto the plaintiff's land. However, SP1 in the course of his testimony explained that it was clear from his on-site visit as well as historical data and his observation of the erosion apparent around the earth drain, that the cause of the damage to the plaintiff's land was directly related to the discharge of water from the development. The fact that SP1 did not measure actual quantities or volumes of water discharged from Arnica's land onto the plaintiff's land does not in itself warrant the conclusion that his conclusions were flawed or entirely without basis;

(d) significantly, Arnica did not call an expert to rebut SP1's evidence but merely relied on the evidence of its managers and consultant engineer who had previously worked on the scheme to testify that the discharge of large volumes of water on the plaintiff's land was largely due to the failure of the Majlis to maintain the river which was full of silt and thereby impeded the natural flow of the river. This was clearly insufficient to rebut the prima facie case established by the plaintiff. In any event, SD5, the engineer who had worked for Arnica on the scheme previously, conceded in the course of his cross-examination that significant volumes of water were discharged from Arnica's development site onto the plaintiff's land; and

(e) as for Arnica's defence of compliance with directives and approvals of the regulatory authorities and JPS, the learned judge concluded correctly that this in itself did not absolve Arnica of liability.

[45] In summary, upon a close perusal of the evidential records, it is clear that the conclusions of the learned judge were well founded and fully supported by the evidence. There is simply no basis to conclude that the learned judge was plainly wrong.

[46] On the issue of res ipsa loquitur, it is apparent from the foregoing analysis of the judgment and the appeal records that the learned judge did not simply invoke the evidential doctrine of res ipsa loquitur. There is no express mention of the doctrine. Arnica relied on the last two lines of para 19 of the judgment to submit that the learned judge appeared to have invoked this doctrine. The last two lines of para 19 read as follows:

> The problem of flooding faced by the Plaintiff only started after Arnica undertook the development work at the said scheme. It is therefore obvious that Arnica has failed to provide an adequate drainage system for the discharge of water from the said scheme.

[47] However, the reading of these two lines in vacuo does not reflect accurately the comprehensive line of reasoning undertaken by the learned judge. As explained and set out above, the learned judge correctly identified and applied the elements of negligence in law, to the facts and circumstances of the case, prior to arriving at her finding in para 19.

[48] The learned judge established the existence of a duty of care, a breach of that duty of care and damage thereby sustained on the evidence before her, and accordingly her conclusions are not amenable to appellate interference. Given a consideration and balancing of the content of the evidence adduced by the plaintiff and Arnica, the conclusions of the learned judge are entirely well founded.

Res ipsa loquitur

[49] Even if this submission that the learned judge effectively invoked the evidential doctrine of res ipsa loquitur is accepted, it would appear from a consideration of the entirety of the evidence that the learned judge would not have been entirely incorrect if she had done so, as the facts of this case appear to justify such application:

(a) the 'unexplained occurrence' in the context of this factual matrix would be the discharge of water from Arnica's development site onto the plaintiff's land, resulting in occasional flooding. This is not seriously in dispute. In any event it is borne out by the evidence of SP1, SP2, SP3 and SD5;

(b) the fact that the unexplained occurrence would not have happened in the ordinary course of things without negligence on the part of someone

other than the plaintiff is borne out by the fact that without the development by Arnica, no deluge of water and occasional flooding would have affected the plaintiff's land. Put another way, the damage to the plaintiff's land arising from the discharge of large volumes of water only came about after the commencement of Arnica's development scheme; and

(c) the circumstance that points to the negligence in question being that of the defendant rather than any other person, is that the discharge of water from the development site was entirely within the management and control of Arnica.

[50] Again, after acquisition of the earth drain or stream in 1994, Arnica retained full access to the same and knew or ought to have been aware of the effects of the discharge of large quantities of water through the inadequate earth drain, resulting in erosion of the banks and effective encroachment onto the plaintiff's land.

[51] Arnica's contention that it was the duty of the Majlis to upkeep the earth drain which had been acquired by the Government (albeit at Arnica's behest) does not answer the plaintiff's complaint that it was the discharge of water from the development site that caused water to overflow from the inadequate earth drain onto the plaintiff's land. It is, therefore, the water flowing from the development site, rather than the maintenance of the earth drain that caused the damage to the plaintiff's land.

[52] Finally, Arnica failed or neglected to adduce any expert evidence to rebut the evidence of the plaintiff's witnesses that the damage was caused by Arnica's activities. In other words, given the application of the doctrine as set out above, there was simply insufficient evidence adduced on the part of Arnica to contradict or deny the plaintiff's analysis of the circumstances causing the damage.

[53] As stated earlier, learned counsel for Arnica sought to emphasise that the fact that there was a time span of five years between the completion of the earth drain works and the occurrence of the flooding meant that it could not have been solely responsible for the damage to the plaintiff's land. However, given the evidence on record, namely the evidence of SP1 and SP3, the consultant engineer and land surveyor respectively, the issue of causation appears to be clear. There was no evidence to rebut or contradict their evidence.

[54] The time span in itself does not mean that the water discharged from Arnica's development site did not cause damage to the plaintiff's land. Again,

Arnica failed to call any expert witness to establish that the existence of the time span gave rise to the possibility of other or alternative causes for the damage to the plaintiff's land.

[55] Having given considerable attention to the appeal records, we conclude that the learned judge did not err in her findings that Arnica was liable to the plaintiff in negligence and nuisance.

Appeal No N-01–149–04 of 2012 — the application to adduce additional documents during the trial

[56] On the issue of the refusal of the judge to allow Arnica to adduce in evidence additional documents in the course of the trial, namely some sketch plans (which were annexed to a letter which in itself was admitted in evidence), we accept the submission of learned counsel for the plaintiff that this refusal has no real adverse effect on Arnica's case as the learned judge accepted the JPS approved plans. As these documents were sketch plans annexed to the letter already in evidence, the non-adducing of these documents did not affect Arnica adversely.

[57] In any event, the learned judge cannot be faulted for having so exercised her discretion, given that Arnica only sought to adduce this evidence after the plaintiff's expert had completed his evidence. In other words, the plaintiff would have been deprived of an opportunity to deal with questions arising in relation to these plans, or it would have been necessary to re-call the plaintiff's expert. This is largely a matter for the trial judge to deal with and determine, in the exercise of her discretion, in the course of conducting the trial. As such, there is no basis for this court exercising its appellate powers to interfere with the exercise of discretion by the learned judge.

Appeal No N-01–55–02 of 2014 — assessment of damages: quantum awarded is excessive

[58] Arnica's complaint in relation to the damages awarded in the course of this separate hearing is that the sum awarded by the learned judge of RM2,017,160 is excessive. To illustrate the point, it was submitted that if by the greatest misfortune, the land were to disappear, the loss would not be as great as the quantum awarded. Reliance was also placed on photographs to establish that the plaintiff's oil palm trees were not damaged.

[59] On the issue that the quantum granted was excessive, the records show that the plaintiff produced clear expert evidence to substantiate its claim. In relation for example to the costs of construction of the concrete drains, Dr Kribanandan, SP1, and Sr Wang Luan Too, SP3, a consultant quantity

surveyor gave detailed reports on the type of drain to be constructed and the costs of constructing such drains, respectively. They were extensively cross-examined during the course of the assessment hearing. They remained essentially consistent in their testimony, as appears from a perusal of the same.

[60] The defendants did not produce any evidence to rebut or contradict their evidence. In these circumstances, the learned judge cannot be faulted for accepting and adopting the plaintiff's witnesses' evidence.

Appeal No N-02(IM)-2370–10 of 2013 — application to adduce expert report and to call the expert to testify

[61] In this context, namely the evidence adduced in the course of the assessment hearing, the appeal in N-02(IM)-2370–10 of 2013 becomes relevant. In this appeal, the learned judge refused Arnica's application to adduce an expert report, and for the expert to testify, in the course of the hearing.

[62] The chronology of facts disclose that after considerable delay on the part of Arnica, and despite clear orders from the court in relation to the disclosure of witnesses and their reports, Arnica chose to file a lengthy 183 page report to rebut the findings of SP1 and SP3 very late in the day. The learned assessment judge exercised her discretion to refuse admission of this report. Such late adducing of Arnica's expert report had the effect of taking the plaintiff by surprise and delaying proceedings considerably. Given that Arnica was well aware of the nature of its liability from the date of pronouncement of judgment against it in terms of liability, its delay in procuring this expert report appears inexplicable.

[63] Nonetheless during the hearing of these appeals, we asked learned counsel for the respondent, Mr Aaron Mathews whether the refusal to allow this evidence onto the record, resulted in Arnica not having been heard in full and not having been accorded an opportunity to rebut SP1 and SP3's evidence.

[64] Learned counsel for the respondent explained the full chronology of events resulting in the learned judge exercising her discretion as she did. It would appear that there was unreasonable delay on the part of Arnica in procuring and adducing its expert report. The learned judge cannot therefore be faulted for exercising her discretion as she did.

[65] However, the alternative submission put before us by learned counsel was that even if we took the view that Arnica had been deprived of an opportunity to be heard, the quantum in question relating to the construction of the box concrete drains between the two experts differed by a sum of

approximately RM300,000. Reference was made to Arnica's expert's assessment in his report, as against the plaintiff's expert's assessment in his (SP3's) report. The plaintiff maintained that it was prepared to accept Arnica's expert's assessment on this front.

[66] Having considered the entirety of the matter however, we are disinclined to interfere with the learned judge's exercise of her discretion as trial judge. This is not a case where we can conclude with any degree of certainty that the learned judge was plainly wrong in the exercise of her discretion.

[67] Reverting back to the appeal on assessment, the next complaint put forward by Arnica was that no regulatory approvals had been approved for the construction of these concrete drains.

No regulatory approval

[68] Arnica also complains that the plaintiff has yet to procure approval from the regulatory authorities for the construction of the box culvert concrete drains ordered by the court. Relying on the case of *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd* [1986] 1 MLJ 412; [1985] 1 LNS 103 per Shankar J (as he then was) it was submitted that damages for the construction of such drains could not be granted in vacuo. The plaintiff, it was submitted, must produce regulatory approval for such construction, prior to any award of damages.

[69] With respect to this contention, we are of the view that *Toyo Textiles* affords one mode of dealing with the grant of damages in a situation where regulatory approvals are required. However, the methodology adopted by Shankar J (as he then was) in that case does not lay down an incontrovertible rule for the grant of damages in all cases where regulatory approvals for the proposed construction by way of compensation is ordered. In this context, we concur with the learned judge that the requisite approvals can be procured prior to actual construction. But the fact that approvals have not been procured as yet ought not to preclude the assessment court from proceeding to determine the reasonable costs of constructing these drains.

Camouflage for future development

[70] It was also submitted that the proposal for this box culvert concrete drains was in effect a camouflage adopted by the plaintiff to facilitate its plans to develop its land in the future. Reference was made to a letter in relation to the change of the plaintiff's land status and sub-division of the land. It was contended that the plaintiff ought not to be allowed to profit from this exercise.

[71] In so far as this contention was concerned, we found that there was simply insufficient evidence before the court to suggest that the plaintiff is seeking to, or has, by the grant of this award profiteered from the same, with a view to facilitating future development.

[72] In these circumstances, we are of the unanimous view that there are no reasons to interfere with the reasoned findings of the learned assessment judge. In this context, we add that we also considered the quantum awarded by way of general and exemplary damages and concluded that the learned judge could not be faulted in law for her reasoning in awarding such quantum.

The three other appeals

[73] The other three appeals relate to interlocutory decisions handed down by the learned assessment judge in the course of the assessment hearing. It is evident from a perusal of the notes of evidence and the chronology of events that these matters arose in the context of determining the mode and extent of the assessment hearing.

[74] The learned judge who heard these suits in relation to liability stated at the end of her judgment that the plaintiff's claim in negligence and nuisance against Arnica was allowed. She then ordered that damages and other reliefs sought by the plaintiff were to be ' ... assessed by the registrar, including the appropriateness of prayers in para 20(a) and (b) of the Re-Amended statement of claim'.

[75] The said prayers 20(a) and (b) are prayers for:

(a) a declaration that Arnica is liable to take measures to ensure that there is no flooding on the plaintiff's land at its own costs to construct proper concrete drains to ensure proper flow of the stream pursuant to specifications of the consulting engineers appointed by the plaintiff; and

(b) a mandatory injunction directing the execution and completion of the work in compliance with the plaintiff's consulting engineers or alternatively that the defendant pay the plaintiff the aforesaid costs of construction to be determined by a quantity surveyor appointed by the plaintiff or determined by the court.

[76] In the course of the liability trial, the plaintiff's engineer, SP1 gave detailed evidence in relation to the type of drains the plaintiff required to be constructed on its land to remedy the problem of the occasional flooding and discharge of water onto its land. SP1 was cross-examined extensively on this issue.

[77] As such, when the matter came up for assessment, the plaintiff maintained that the type of concrete drains required had already been determined in the course of the liability trial and it only remained to determine whether the defendant would undertake the works as set out in prayers (a) and (b) (i) and (ii), or whether the defendant should simply pay the costs of construction to the plaintiff, such quantum to be determined by the plaintiff's quantity surveyor or the court. In other words, the issue of the technical details of the type of concrete drain and its efficacy in addressing the problems faced by the plaintiff was moot.

[78] However, Arnica sought in effect to re-open this issue by seeking to adduce expert evidence on the type of drain to be constructed, relying on the fact that the liability court had ordered that the 'appropriateness' of prayers in 20(a) and (b) also be considered. When perused carefully, it is evident that the two prayers seek to achieve the same end, namely the construction of a particular type of drain as recommended by the plaintiff's consultant's engineers. The only question that remained was whether Arnica should undertake the work under the supervision of the plaintiff's engineers or whether the costs of such construction should be awarded to the plaintiff to enable it to effect such construction. The learned assessment judge concurred with the plaintiff on this issue in Appeal No N-02(IM)-2369–10 of 2013 (order 33) and we find no reason to fault her decision. In any event, this issue of the type of drain to be constructed was effectively dealt with at the liability stage, leaving no room for a re-agitation of this issue at the assessment stage.

[79] Similarly we are of the view that the other two appeals also relate to matters involving the exercise of discretion by the assessment judge, who as the judge of first instance, is best positioned to make an assessment in these matters. It is worth repeating that this court in exercising its appellate function, is loath to interfere with the exercise of such discretion, save in cases where such exercise of discretion is plainly wrong or misconceived. That is not the case here. Accordingly we are of the unanimous view that these appeals should also be dismissed.

[80] All six appeals are therefore dismissed with costs.

Appeals dismissed with costs.

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